I think, is not held as strongly now as it was a few years ago. The reason is manifest: the courts have to make it clear that crime does not pay and the only way they can do so is by the length of sentences. Sentences show the court's disapproval, on behalf of the community, of particular types of criminal conduct."

As I have already stressed in this judgment, burglary of private dwelling houses is a very grave crime indeed. The retribution element is very strong in this case. I am satisfied that in most cases fines are not sufficient punishment for this class of crime. The time has come when those who indulge in breaking into other people's homes to steal their possessions must expect to receive sentences of longest terms of imprisonment.

The next aspect is the element of deterrence. This is what Lawton L.J. said in *Sargeant* at page 77:

"Deterrent sentences may very well be of considerable value where crime is premeditated. Burglars, robbers and users of firearms and weapons may very well be put off by deterrent sentences."

The deterrent element is very strong in the present case. As was said by Lawton L.J., burglars may very well be put off by deterrent sentences. Deterrent sentences are of considerable value where crime is premeditated.

From the record, it appears that neither Rajandran nor Ragupathi has ever been given a sentence of immediate imprisonment. "As a general rule it is undesirable that a first sentence of immediate imprisonment should be very long, disproportionate to the gravity of the offence and imposed ... for reasons of general deterrence, that is as a warning to others. The length of a first sentence is more reasonably determined by considerations of individual deterrence" said MacKenna J. in *Reg.* v. *Curran*[4]. It is right that they should receive substantial sentences for this class of crime but a sentencing court must be careful not to pass a sentence which is disproportionate to the gravity of the offence. It is undesirable that a first sentence of immediate imprisonment should be imposed for reasons of general, as opposed to individual, deterrence. But it might be said that a thief who is minded to break into other people's homes to steal their goods is not likely to be deterred by the fact that he may get three years rather than two years or six years rather than three years. The hearing of prison gates closing behind him is an experience which he does not want again. That is right, but what has got to be maintained is this; if persistent burglars are caught they will be punished and punished very severely. Therefore it must be made clear that anyone found deliberately breaking and entering homes for the purpose of stealing substantial quantities of goods for disposal must expect a severe sentence.

For the reasons I have indicated this was not a suitable case for the kind of sentence which was imposed by the magistrate in this case. It is in the interest of the public that I think a sentence of eighteen months' imprisonment is appropriate for the first offence under section 454 of the Penal Code *i.e.*, for the burglary committed at Cik Maya binti Abdul Aziz's house. For the second offence under the section *i.e.*, for the burglary committed at Mr. Cheong's house, I think a concurrent sentence of two years' imprisonment is appropriate. For the offence under section 457 of the Penal Code, I think a concurrent sentence of two and a half year's imprisonment is appropriate. The fines imposed by the magistrate are set aside. If the fines have been paid they are to be refunded. As for Rajandran, since he has been serving sentence because he was not able to pay the fines, his sentence should run from the date of his conviction.

Order accordingly.

Solicitors: *Lawrence, Joseph, Ghani, Mahalingam & Co.*

PALMCO HOLDINGS BHD. v. COMMISSIONER FOR LABOUR & ANOR.

[O.C.J. (Mohamed Dzaiddin J.) January 28, 1985]

[Penang – Originating Summons No 515 of 1983]

Labour Law – Termination Benefits – Whether regulations ultra vires – Employment (Termination and Lay-off Benefits) Regulations, 1980, reg. 8 – Employment Act, 1955, s. 60J.

In this case the plaintiff had bought over the business of a beach hotel from the Casuarina Beach Hotel Sdn. Bhd. It was agreed *inter alia* that the plaintiff would offer employment to all existing employees of the hotel except four persons who had passed the retirement age and were relatives of the family who were the former owners of the hotel. The four persons applied to the Director of Labour for termination benefits but the hearing of the application

was adjourned to enable the plaintiff to challenge the *vires* of regulation 8 of the Employment (Termination and Lay-off Benefits) Regulations, 1980. It was argued that the power to make regulations for termination benefits under the Employment Act, 1955 was limited to providing for payment by employers only. It was further argued that such a power does not include or affect non-employers.

Held: reg. 8 of the Regulations is restricted to a situation where there is a change of ownership in a going concern. The regulation is strictly ancillary and incidental to the powers of the Minister under section 60J of the Employment Act 1955, to make employers liable for the payment of termination benefits. The regulation is therefore not *ultra vires* the Employment Act, 1955.

Cases referred to:-

(1) *Young* v. *Tockassie* (1905) 2 C.L.R. 470, 477.
(2) *Shananhan* v. *Scott* (1956) 96 C.L.R. 245, 250.
(3) *Utah Construction* v. *Janos Pataky* [1966] A.C. 629, 640.

ORIGINATING SUMMONS.

Cyrus V. Das for the plaintiff.

P.M. Mahalingam, Senior Federal Counsel, for the defendants.

Cur. Adv. Vult.

Mohamed Dzaiddin J.: This is an application by the Plaintiff for a declaration that the Employment (Termination and Lay-off Benefits) Regulations P.U.(A) 278 of 1980 ("the Regulations") is *ultra vires* the Employment Act 1955 and is therefore invalid, null and void.

The facts of the matter in dispute are as follows. By an agreement dated April 27, 1981 made between the Plaintiff and Messrs Law Geok Swee & Company Sendirian Berhad, the Plaintiff bought over the business of operating a beach hotel called Casuarina Beach Hotel Sendirian Berhad, Batu Ferringhi, Penang from Casuarina Beach Hotel Sendirian Berhad, a wholly owned subsidiary of Messrs Law Geok Swee & Co. Sdn. Bhd.. It was agreed, inter alia, between the parties that the Plaintiff would offer employment to all the existing employees of the hotel except four persons who were relatives of Law Geok Swee's family. In this respect, it was orally agreed that they would not be offered employment by the Plaintiff because they has passed the retirement ages and that some of them were not regular employees as the business was then a family concern. Being dissatisfied with this decision, these four persons lodged a complaint for termination benefits with the Director of Labour, Penang who then issued a summons on the Plaintiff to answer the claim. The hearing of this summons was adjourned to enable the Plaintiff to challenge the *vires* of the Regulations.

It is common ground that the Regulations were made by the Minister of Labour under Section 60J.(1) and not under Section 102 of the Employment Act 1955. Section 60J.(1) states as follows:-

"The Minister may, by regulations made under this Act, provide for the entitlement of employees to, and for the payment by employers of –

(a) *termination benefits;*
(b) lay-off benefits;
(c) retirement benefits."

In the present case, the question is whether the Regulations is within the scope of the powers conferred on the Minister under Section 60J(1).

Mr. C.V. Das, counsel for the Plaintiff had submitted that under the 60J.(1), the power of the Minister is restricted in the sense that it limits the Minister's rule-making power by providing "for payment by employers" only. He argue that such a power of the Minister does not include or affect non-employers. Thus by seeking to include non-employers in Regulation 8(2) such Regulation is inconsistent with the principal Act and therefore void under Section 23 of the Interpretation Act 1967. He further stated that the principal Act *i.e.* The Employment Act 1955 only applies to employers and employees and any purported regulations made to create liability on non-employers is *ultra vires.*

In *Young* v. *Tockassie*(1) Griffith C.J. in the High Court of Australia stated that the words "ultra vires" may mean two things. One is where "a regulation or a by-law may be *ultra vires* in the sense that it deals with a subject not within the scope of the power conferred upon the delegated legislative authority," or "it may be *ultra vires* because, although dealing with such a subject, it exceeds the prescribed limits within which the authority may be exercised."

The relevant regulation is Regulation 8. Regulation 8(1) provides that the contract of service of the employee shall be deemed to have been terminated unless: (a) within 7 days of the change of ownership the new owner offers to renew the contract of service of the employee or to continue

to employ the employee under the terms and conditions of employment which are not less favourable than those under the outgoing owner; and (b) the employee accepts such offer.

Regulation 8(2) reads as follows:

"If the person by whom the business is to be taken over immediately after the change occurs does not offer to continue to employ the employee in accordance with paragraph (1), the contract of service of the employee shall be deemed to have been terminated, *and consequently, the person by whom the employee was employed immediately before the change in ownership occurs and the person by whom the business is taken over immediately after the change occurs shall be jointly and severally liable for the payment of all termination benefits payable under these Regulations.*"

(The emphasis is mine.)

It is clear from Regulation 8(2) above that where the contract of service of the employee is deemed to be terminated under paragraph (1), both the new and outgoing owners shall be jointly and severally liable for the payment of all termination benefits payable under the Regulations. Further, Regulation 8(3) expressly provides that where an offer is accepted by such employee, the period of employment under the outgoing owner shall be deemed to be a period of employment under the new owner, and the change of employer shall not constitute a break in the continuity of the period of his employment.

The pecularity of Regulation 8 is the obligation imposed on the new employer once he takes over the ownership of a going-concern. It creates joint and several liabilities on the outgoing as well as the new employer who takes over the business without a break in the continuity of employment of the employee. In short, this is the precise intention of Regulation 8 in that upon a change of ownership in the business, the new owner steps into the shoes of the outgoing employer without disrupting the continuity of employment. On the other hand, where termination of employment is occasioned by other causes, then subject to certain exceptions, Regulation 4 applies. Thus upon considering both Regulation 4 and Regulation 8, it does appear to me that the clear intention of Parliament is to provide for this distinction which in the case of Regulation 8 facilitates a continuity of service upon a change of ownership.

Now, does the situation in Regulation 8 infringe the rule-making powers of the Minister under Section 60J.(1) of the Employment Act 1955?

The Employment Act is an act relating to employment. Section 60J.(1) confers on the Minister the power to make regulations to provide for the entitlement of employee to and for the payment by the employer of (a) *termination benefits;* (b) lay-off benefits; and (c) retirement benefits. In my opinion, after considering Regulation in the light of the powers conferred on the Minister under Section 60J.(1) of the Act, I do not think Regulation 8 has exceeded the scope of the section. I think the distinction which Mr. Dass was trying to point out is on the question of the liability of the new employer in the business and the absence of the contract of service between the latter and the employee of the outgoing employer. However, as I have stated earlier, Regulation 8 is restricted to a situation where there is a change of ownership in a going concern. This Regulation is strictly ancillary and incidental to the powers conferred by Parliament on the Minister under Section 60J.(1) to make employers liable for the payment of termination benefits. In this respect I would adopt with approval the statement in the judgment of Australian High Court in *Shananhan* v. *Scott*[2] (approved by the Privy Council in *Utah Construction* v. *Jonos Pataky*[3]) to the following effect:

"The result is to show that such a power does not enable the authority by regulations to extend the scope or general operation of the enactment but is strictly ancillary. It will authorise the provision of subsidiary means of carrying into effect what is enacted in the statute itself and will cover what is incidental to the execution of its specific provision. But such a power will not support attempts to widen the purposes of the Act, to add new and different means of carrying them out or to depart from or vary the plan which the legislature has adopted to attain its ends."

For the above reasons, the obvious answer to this application is that the Regulations made by the Minister is within his powers conferred under Section 60J.(1) of the Act and is therefore valid and enforceable. This application is dismissed with costs.

Application dismissed.

Solicitors: *Shook Lin & Bok.*